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IN THE

Supreme Court of the United States

October Term 1991

MATTHEW B. GOODALL, An Infant By His Father and Next Friend, Robert B. Goodall and Robert B. Goodall and Kathleen N. Goodall,

Appellants,

v.

STAFFORD COUNTY SCHOOL BOARD,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Stafford County school board's refusal to allocate Individuals with Disabilities Education Act (IDEA) funds to furnish Matthew Goodall a cued speech interpreter at Fredericksburg Christian School burden rights secured to the Goodalls under the free exercise clause of the first amendment and burden their rights as parents to direct the education and religious upbringing of their children, so that the school board must justify such refusal by a compelling state interest?

II. Will the establishment clause of the first amendment be violated if the school board allocates IDEA funds to furnish Matthew Goodall a cued speech interpreter at Fredericksburg Christian School? Conversely, does the

establishment clause prohibit the school board from selectively disobeying the IDEA to deny assistance to handicapped children attending religious schools?

III. Does the Individuals with Disabilities Education Act require the school board to allocate federal IDEA funds to provide Matthew Goodall a cued speech interpreter on the premises of Fredericksburg Christian School?

A. What does the statute say?

B. How has the Supreme Court interpreted the statutory language as applied to parentally placed private school children?

C. Has the U.S. Department of Education interpreted the act and its regulations to require the provision of services on the premises of private (even parochial) schools?

D. When does the federal act require the delivery of services on the premises of a private school?

E. How did the Fourth Circuit err in construing the federal statutes?

IV. Do Virginia statutes prohibit the use of federal IDEA funds to provide services to handicapped children in religious schools?

V. Issues on remand.

PARTIES TO THE PROCEEDING:

Matthew B. Goodall, an infant, by his father and next friend, Robert B. Goodall, Robert B. Goodall and Kathleen N. Goodall, Appellants

Stafford County School Board, Appellee

Virginia School Boards Association, Amicus Curiae

School Board of Henrico County Amicus Curiae

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STATEMENT OF THE GROUNDS OF JURISDICTION

Date of entry of the judgment sought to be reviewed. April 11, 1991.

Statutory jurisdiction of this court: 28 USC sec 1254

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution
Article VI
Amendment I

Federal Statutes

20 USC sec 241e(a), subsequently sec 241e-1

20 USC sec 1401 (a)(16)

20 USC sec 1413 (a)(4)(A)

20 USC sec 1413 (a)(4)(B)

20 USC sec 1413 (a)(9)

20 USC sec 1415 (E)(2)

42 USC sec 1983

Federal Regulations

34 CFR sec 300.400-403

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34 CFR sec 76.1(a)

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34 CFR sec 76.650 - 76.662

45 CFR sec 116.19

Virginia Constitution Article 8, sec 10

Virginia Statutes

Section 22.1-216

Section 22.1-218(A)

Section 22.1-219

Section 22.1-220

The pertinent text of each provision is contained in the Appendix to this Petition [see separate volume].

STATEMENT OF THE CASE

Matthew Goodall's parents requested that the Stafford County school board provide special education and related services for their deaf son Matthew for the 1988-89 and subsequent school years. In a draft Individualized Education Program (IEP), the school board proposed to provide Matthew a full-time cued speech interpreter at Drew Middle School, a Stafford County public school. The Goodalls requested that the location of that service be Fredericksburg Christian school (FCS). The County

would not agree on the location of service. Accordingly, the Goodalls requested a due process hearing. The state hearing officer concluded that Stafford County should not be required to furnish an interpreter at Matthew's private Christian school. The Goodalls appealed the decision. The state review officer affirmed the hearing officer's decision on the basis that the school board's furnishing Matthew Goodall a cued speech interpreter at his private Christian School would violate the establishment clause of the United States Constitution.

The Goodalls then filed a complaint in the United States District Court for the Eastern District of Virginia. The District Judge granted summary judgment to Stafford County, stating that he was

not ruling on constitutional grounds, but rather on the basis that Virginia statutes or regulations did not allow Stafford County to pay for special education and related services for Matthew at an unaccredited private school.

The Goodalls appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the District Court decision holding:

a. Virginia's constitution and statutes consistently express the policy of funding special education only in non-sectarian schools.

b. By offering Matthew Goodall the services of a cued speech interpreter at Drew Middle School the County is in full compliance with the requirements of the IDEA and its regulations.

c. The County's denial of a publicly funded cued speech interpreter for Matthew Goodall at Fredericksburg Christian School burdens the Goodalls' sincerely held religious beliefs, must be subjected to strict judicial scrutiny, and would violate the free exercise clause of the first amendment unless it could be justified by a compelling state interest.

d. The County's refusal to provide an interpreter to Matthew Goodall at FCS is justified by the compelling interest of not violating the establishment clause.

MATERIAL FACTS

1. Matthew Goodall has been a resident of Stafford County since his birth. He became deaf after an attack

of meningitis at age 3 1/2. Shortly thereafter he began a preschool class using cued speech. (App 2)

2. Cued speech is a visual representation of spoken language. It is a phonetic system which enables a deaf person to distinguish visually every sound spoken to him. (App 2)

3. A cued speech interpreter is not a teacher. He or she is simply the "ears" of the hearing impaired child. The interpreter does not affect the content of speech. In fact, a machine sometimes called an "autocuer" is being developed which may eventually take the place of the human interpreters. (App 5)

4. An interpreter is a service to the individual handicapped child and not to the school that the child attends.

5. Matthew entered 6th grade at Fredericksburg Christian School (FCS), a private sectarian (Christian) school in the 1988-89 school year. FCS has never provided a cued speech interpreter to any student. Matthew's parents have borne the burden of providing interpreters: his mother Kathy Goodall has interpreted for him, and the Goodalls have employed interpreters. (App 6)

6. Matthew would attend FCS if he were not handicapped (deaf).

7. Matthew is successfully mainstreamed full time with hearing students at FCS. To be successfully mainstreamed, he requires the special education and related service of a full time, fluent cuing interpreter in his regular classroom. (App 8)

8. A full time interpreter for Matthew would necessarily be one on one. Stafford County has no other hearing impaired student in Matthew's grade using cued speech. (App 7)

9. Stafford County furnishes a full time, one-on-one, fluent, cued speech interpreter to other deaf children attending its public schools. (App 4)

10. It would cost no more to furnish Matthew a full time, fluent, cuing interpreter at FCS than to do so at Drew Middle School.

11. The Plaintiffs, Robert B. Goodall and Kathleen N. Goodall, hold a sincere Bible-based religious conviction that they are to provide their children

with a Christian education and to educate their children in Christian schools at this time.

BASIS OF FEDERAL JURISDICTION

> The Court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the Court determines is appropriate. 20 USC sec 1415 (E) (2).

ARGUMENT

I. Does the Stafford County school board's refusal to allocate federal IDEA funds to furnish Matthew Goodall a cued speech interpreter at Fredericksburg Christian School burden rights secured to the Goodalls under the free exercise clause of the first amendment and burden their rights as parents to direct the education and religious upbringing of

their children, so that the school board must justify such refusal by a compelling state interest?

The Fourth Circuit held that the Goodalls' free exercise rights were burdened, citing Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981):

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial. 450 U.S. at 717-18.

It held that this "infringement" would be subject to strict scrutiny and would require a compelling state interest to justify it. The holding is based on the unemployment compensation cases[1] alone. The Supreme Court has refined the analysis of those cases. In Bowen v. Roy, 476 US 693 (1986) the Court held that when a statute allows an individual hearing; and the applicant shows that he acted or refused to act because of sincerely held religious beliefs; then he cannot be denied the

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1. Frazee v. Illinois Dep't of Employment Security, 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm., 480 U.S. 136 (1987); Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963) were cited by the Fourth Circuit. Goodall by Goodall v. Stafford County School Board, 930 F2d 363, 369 4th Cir (1991).

benefit of the statute. The IDEA does provide an individual hearing on the point in issue in this case, location of service. 34 CFR sec 300.403(b).[2] On that point (location of service) it is undisputed that the Goodalls placed Matthew Goodall at FCS based on their sincerely held religious conviction. Accordingly, the Bowen court would find that Matthew Goodall could not be denied the benefit of the statute absent a compelling state interest.

In Employment Division v. Smith, 494 U.S. ___, 108 LE 2d 876, 110 S Ct ____ (1990) the Court held that when free exercise rights are coupled with the constitutionally protected rights of

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2. See comment to 34 CFR sec 300.552: "the overriding rule in this section is that placement decisions must be made on an individual basis".

parents to direct the education and religious upbringing of their children, a compelling state interest is required to sustain legislation which burdens those rights.

Matthew Goodall's case presents all three of these constitutional rights: free exercise, the right of parents to direct the education of their children, and the right of parents to direct the religious upbringing of their children. Therefore, the Employment Division Court would find that Matthew Goodall could not be denied the benefit of the IDEA without a compelling state interest.

In the unemployment compensation cases the application of the statute alone would reach a negative result: the applicant would be denied the benefit. In each of those cases however, the

Supreme Court held that the free exercise clause required the benefit to be conferred. Similarly, in Employment Division v. Smith the application of the neutral, generally applicable statute alone would reach a negative result: the appellant's use of peyote would be made criminal without exception. Yet the court held that if the constitutionally protected rights of parents, which are present in Matthew Goodall's case, had been coupled with free exercise rights, then the state would have been required to make an exception or show a compelling state interest not to do so.

Therefore, even if the proper interpretation of the IDEA in Matthew Goodall's case would not require the benefit, an exception would have to be

made and the benefit must be conferred unless there is a compelling state interest not to do so.

However the proper interpretation of the IDEA in fact requires that the benefit be conferred (see part III of this petition beginning at page 33). In other words, the school board's reliance on the establishment clause is not to justify obedience to a neutral, generally applicable law which would deny a benefit, but rather to justify its disobedience to a neutral, generally applicable law that requires a benefit.

The heart of this case, and the central error in the Fourth Circuit's analysis of it, is that the school board pretends to be a legislature which can refuse to fund some constitutionally protected activities without violating

the constitution. This is simply not true. Congress is the legislature; the school board is an administrator. Congress' legislation does not draw a religious/secular line between those who will benefit and those who will not. Therefore, the school board's decision to selectively disobey the statute and to withhold its benefit only from those practicing their constitutionally protected rights is not the prerogative of a legislature, but the religious discrimination of an administrator.

The Fourth Circuit said the school board's "infringement" on the Goodalls' first amendment rights must be subjected to strict scrutiny. Yet the opinion has no strict scrutiny analysis: the court does not cite statutory language which would deny the benefit and then consider

whether such language could be more narrowly drawn to effect a compelling state interest without offending the constitutionally protected rights. It cites no such statutory language, because it starts from the wrong point: the school board's conduct rather than Congress' legislation.

CONCLUSION: The Goodalls' constitutionally protected free exercise rights and rights of parents to direct the education and religious upbringing of their children are burdened when they are forced to choose between the important government benefit of educational assistance for their handicapped child and exercising those constitutionally protected rights. Any

statute which poses that choice must promote a compelling state interest and must be as narrowly drawn as possible.

II. Will the establishment clause of the first amendment be violated if the school board allocates IDEA funds to furnish Matthew Goodall a cued speech interpreter at Fredericksburg Christian School? Conversely, does the establishment clause prohibit the school board from selectively disobeying the IDEA to deny assistance to handicapped children attending religious schools?

By granting certiorari the Court can address a nationwide problem: many local school boards and courts believe that "separation of church and state" justifies religious discrimination: denying the benefit of religiously

neutral social welfare legislation only to people practicing their religious beliefs.

The Fourth Circuit misstated the holding of Lemon v. Kurtzman, 403 US 602 (1971) and thereby reached the wrong conclusion. It stated:

> The seminal Establishment Clause case is Lemon v. Kurtzman, 403 US 602 (1971), in which the Supreme Court has set forth a three-part test to determine whether government action impermissibly establishes, sponsors, or results in active involvement in religious activity. Such action violates the constitution if any one of the of the following prongs is not satisfied:
> 1. the government action must have a secular purpose;
> 2. the action must not have the primary effect of advancing religion; and
> 3. the action must not create excessive entanglement between church and state. (emphasis added) Goodall, supra 930 F 2d at 370. (Emphasis added)

In fact Lemon states:

> Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster "an excessive government entanglement with religion". Lemon, 403 US at 612 (emphasis added)

The error is obvious: Lemon v. Kurtzman held that it is a statute that is being analyzed against the establishment clause, not government action, and not the impact of the statute in an isolated case.

The Fourth Circuit made the same mistake the Washington Supreme Court made in Witters v. Washington Department of Services for the Blind, 474 US 481 (1986). Mr. Justice Powell addressed this error as follows:

> The Washington Supreme Court reached a different conclusion [that the Washington statute violated the federal constitution's establishment clause] because it found that the

> program had the practical effect of aiding religion in this particular case . . . In effect, the court analyzed the case as if the Washington Legislature had passed a private bill that awarded petitioner free tuition to pursue religious studies.
>
> Such an analysis conflicts with both common sense and established precedent. Nowhere in Mueller did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather we looked to the nature and consequences of the program viewed as a whole . . . This is the appropriate perspective for this case as well. Witters, 474 US at 492.

The Fourth Circuit erred because it analyzed this case as if Congress had passed a private bill that awarded Matthew Goodall funds to employ an interpreter at a religious school.

Because the Fourth Circuit began from the wrong point: the school board's conduct rather than Congress' legislation, it never attempted to apply

Lemon's analysis to the IDEA. Its opinion never discusses whether the legislation has a secular purpose; whether the legislation's principal or primary effect neither advances nor inhibits religion; and whether the statue fosters an excessive government entanglement with religion.

In contrast, the Supreme Court in Witters examined the Washington statute and listed 9 reasons the Washington statute did not offend the first amendment's establishment clause:

> . . . vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. Washington's program is "made available generally without regard to the sectarian-nonsectarian, or

> public-non-public nature of the institution benefited. . . and is in no way skewed towards religion. It is not one of "the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court" . . . it creates no financial incentive for students to undertake sectarian education. . . it does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend [the] aid on wholly secular education, and as a practical matter have rather greater prospects to do so. . . in this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the state. Witters, 474 US 481 at 487-489.

The IDEA as a statutory scheme is virtually identical to Washington's statute, and the facts of Matthew Goodall's case are virtually identical to those in Witters. Indeed, Matthew's case is stronger because:

a. An interpreter would benefit Matthew personally, but would not benefit his Christian school even indirectly; while the aid in Witters paid (indirectly) tuition to his school; and

b. IDEA is a federal statute. It may be presumed that Congress had at least as high a regard for the first amendment's religion clauses as the Washington legislature.

The Fourth Circuit also erred in dismissing Witters as inapposite. It stated:

> Witters is the last of a line of cases in which the Supreme Court has upheld tax deductions taken by and tuition reimbursements to students at religious institutions. [citations omitted] As such, the decision has little application to the instant case. In each of those cases, the Court was confident that there existed an "effective means for insuring that the cash

> reimbursements would cover only secular services." Goodall, supra 930 F 2d at 371.

No one reading Witters could conclude that there was any effective means for insuring that the tuition assistance to Mr. Witters would cover only secular services. Mr. Justice Marshall stated:

> The question presented is whether, on the facts as they appear in the record before us, extension of aid to petitioner and the use of that aid by petitioner to support his religious education is a permissible transfer. Witters, 474 US at 487. (emphasis added)

and concluded:

> Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. Witters, 474 US at 488, 489. (emphasis added)

The Supreme Court's establishment clause education cases have divided the statutes which the Court has upheld and struck down in five ways:

1. If the aid is to the school, then the statute is struck down. Grand Rapids School District v. Ball, 473 US 373 (1975). If the aid was directly to students or their parents, then the statute was upheld: Everson v. Board of Education, 330 US 1 (1946) (transportation of all children).

The IDEA is like the statutes which were upheld: IDEA assistance is the handicapped children, not to schools.

2. Secular aid to parochial schools will be struck down if it is massive or substantial. It amounts to a state subsidy of parochial schools by

relieving them of their duty to provide academic instruction. Aguilar v. Felton, 473 US 402 (1985).

No one contends that the IDEA massively provides aid to sectarian schools. Nor will Fredericksburg Christian School be relieved of any burden if the Stafford school board begins furnishing Matthew Goodall a cued speech interpreter. The private school does not bear that burden now.

3. If the aid was teachers, then the statute was struck down; but statutes providing other aid were upheld. Wolman v. Walter, 433 US 229 (1977) (upholding statutory provisions allowing public personnel to provide speech, hearing and psychological diagnostic services on parochial school premises).

IN MATTHEW GOODALL'S CASE IT IS STIPULATED THAT INTERPRETERS ARE NOT TEACHERS AND DO NOT AFFECT THE CONTENT OF SPEECH. (App p 5)

4. If the aid recipients were all members of a religious group, then the statute was struck down. Lemon v. Kurtzman, 403 US 602 (1971). (Two hundred and fifty teachers at Roman Catholic schools were the only beneficiaries of the act). If the aid was for all students, religious or secular, then the statute was upheld. Witters and Everson, supra; Mueller v. Allen, 463 US 388 (1983) (upholding Minnesota statute allowing state taxpayers to deduct educational expenses of their children).

No one contends that the recipients of IDEA assistance are all members of a religious group.

5. All of the statutes that were struck down were state law schemes. In contrast, the IDEA is a federal statute, and this Court has given deference to Congress' sensitivity to first amendment values in its educational assistance legislation. Tilton v. Richardson, 403 US 672 (1971).

On each of these five factors the IDEA is like the statutes which the Supreme Court has upheld; and it is unlike the statutes which were struck down.

Not only does the establishment clause not support the school board's position, but it also protects the Goodalls from the board's religious

discrimination. In each of the cases just cited a statute was upheld or struck down. In no case was an administrator permitted to selectively disobey a religiously neutral, generally applicable statute to give different and inferior treatment only to persons practicing sincerely held religious beliefs.

In Allegheny County v. Pittsburgh ACLU, 492 US ____, 106 L Ed 2d 472, 109 S Ct ____ (1989), the Court stated the establishment clause principle that government may effect no favoritism among sects or between religion and non-religion.

The IDEA is religiously neutral. It doesn't advance or inhibit religion. But when the school board refuses to spend IDEA funds to benefit children in

sectarian schools, then government has effected a favoritism of non-religion over religion and conveyed a message of government's disapproval of religion in violation of the establishment clause.[3]

The chilling effect on protected freedoms is government hostility, not neutrality, toward religion.

This Court stated in Bowen v. Roy:

> Thomas and Sherbert may be viewed as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect. Bowen, 476 US at 708.

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3. The school board's action also violates the fourteenth amendment of federal constitution: it is state action which abridges a privilege of a citizen of the United States (Matthew Goodall in receiving federal IDEA funds which are for all handicapped children); and it violates the Civil Rights Act, 42 USC sec 1983: under color of law the board has deprived the Goodalls of rights and privileges secured by the Constitution and federal laws.

The establishment clause is violated when the school board affords handicapped children attending religious schools unequal and inferior treatment.

III. Does the Individuals with Disabilities Education Act require the school board to allocate federal IDEA funds to provide Matthew Goodall a cued speech interpreter on the premises of Fredericksburg Christian School?

By granting certiorari the Court can address two nationwide concerns: first, the Department of Education has consistently stated that Aguilar v. Felton, does not apply to the IDEA, yet some decisions of courts and school boards are made as if it did; second, local school boards will always be tempted to allocate IDEA funds to

themselves to the exclusion of private school children; and few handicapped children or their parents will have the resources to defend against systematic violation of the EDGAR regulations which require benefits to be afforded such children.

A. What does the statute say?

The IDEA provides federal funds which are distributed through local public school boards to provide special education and related services for handicapped children whether or not they attend public school.

The extension of the act's benefit to private school children is addressed in the statute itself, 20 USC sec 1400 et seq, in the IDEA regulations, 34 CFR sec 300.400-403,450-452, and in the

education department general administrative (EDGAR) regulations, 34 CFR sec 76.651-76.663.

The act distinguishes two groups of private school children. For those placed by the public school system (because it is unable to meet their needs in the public system):

a) each child is entitled to special education and related services;

b) his entire educational expense is paid by the public system; and

c) the portion of the private school's program under which he receives services must meet state standards.

In contrast, for parentally placed private school children:

a) each child does not have an individual right to services. Rather the selection procedure is governed by the regulations.[4]

b) the public doesn't pay for the child's education at the private school but only his special education;

c) the private school need not meet state standards.

B. How has the Supreme Court interpreted the statutory language as applied to parentally placed private school children?

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4. Under that procedure Matthew Goodall must be selected, because Stafford provides one-on-one fluent cued speech interpreters to deaf children attending its public schools and has stipulated that that is the appropriate service for him. He has in fact been selected to receive services. The dispute is over the proper location of services.

The Supreme Court has at least once before addressed this issue. In Wheeler v. Barrera, 417 US 402 (1974) parents of parochial school students in Kansas City, Missouri brought a class action against the public school system alleging that the school system had received Title I, 20 USC sec 241e-1 (remedial education) money and spent it to provide materials, equipment and remedial education teachers in the public schools, and to provide materials and equipment but not remedial education teachers in the private schools; and that was not a comparable benefit as required by the regulations. They showed that the school system spent about 1/3 as much money per pupil on the private parochial school children as it did on the public school children.

Although it construes another statute, Wheeler v. Barrera, should be followed in construing the IDEA, because:

(1) the language of Title I, its regulations (45 CFR sec 116.19), a Department of Education handbook concerning the extension of its benefit to private school children, and the Supreme Court's language in Wheeler v. Barrera are now essentially mirrored by the IDEA, its regulations, and the EDGAR regulations;

(2) both Title I and the IDEA provide federal educational funding for children in both public and private schools;

(3) the legislative aim of both acts is to assist children rather than schools:

> The term "special education" means specifically designed instruction at no cost to parents or guardians to meet the unique needs of a child with a disability . . ." 20 USC sec 1401(a)(16);
>
> (4) Because each
>
> act was designed to be administered by local public education officials, a number of problems naturally arise in delivery of services to eligible private school pupils. Wheeler v. Barrera, 417 US at 406;[5] and

(5) both Acts contemplate and allow the use of public personnel on the private school premises.[6]

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5. The Goodalls believe, but have been prohibited from proving in the absence of a trial, that the Stafford County school board has never spent IDEA funds on children enrolled by their parents in any private schools, secular or religious.

6. The Wheeler Court wisely left for a later day establishment clause concerns if the school board chose to put public personnel in the private schools. When that later case came, the court decided that remedial education teachers on private school premises would violate the establishment clause, Aguilar v. Felton, 473 US 402 (1985); but that

The Wheeler Court held that Kansas City's allocation of federal funds was not comparable. It remanded the case to allow the school board to fashion a comparable benefit for parochial school students. The court specifically stated

> providing nothing to fill the gap, however, is not among the acceptable alternatives. Wheeler v. Barrera, 417 US at 425.

The Fourth Circuit held that the school board satisfies its obligation under the IDEA to provide special education to parochial school students by offering services at a public school site. It cited the "genuine opportunity

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other non-teacher public school personnel on the premises of private schools would not offend the establishment clause, Wolman v. Walter, 433 US 229 (1977). In Matthew Goodall's case it is stipulated that a cued speech interpreter is not a teacher and does not affect the content of speech. (App 5)

for equitable participation" language of 34 CFR sec 76.651 and the limited methods of delivering services set out in Virginia regulations. Virtually identical language was in Title I, and the opportunity to attend public school to receive Title I benefits was available to the parochial school students in Wheeler v. Barrera. Yet the Supreme Court implicitly rejected the argument that an offer of services at the public school site would comply with the statute, calling it "providing nothing".

Matthew Goodall's case under the IDEA is even stronger than that of the parochial school children in Wheeler v. Barrera for two reasons:

1. Title I required only a comparable benefit for private school children in general. The Supreme Court did not want to become a school board determining what form that comparable benefit should take. In contrast, while the IDEA includes "comparable benefit" language, it also requires the appropriate special education service for each handicapped child Board of Education v. Rowley, 458 US 176 (1982). It is stipulated that the appropriate special education service for Matthew Goodall is a full time cued speech interpreter. (App 7)

2. No free exercise claim was made by the parents in Wheeler v. Barrera. They won on the language of the statute

and regulations alone, that a comparable educational benefit had not been distributed to their children.

C. Has the U.S. Department of Education interpreted the act and its regulations to require the provision of services on the premises of private (even parochial) schools?

Secretary of Education William J. Bennett wrote to each chief state school officer to provide clarification on the implications of Aguilar v. Felton, 473 US 402 (1985):

> Likewise, the Felton decision need not have the effect of prohibiting on-premises services to private school children in all other Federal programs. With respect to programs under the Bilingual Education Act and the Education of the Handicapped Act, for example, a prohibition of on-premises instructional services may make it impossible to provide the instructional services required by the statutes in question. The special problems and statutory schemes for these programs were not

before the Supreme Court when it decided Felton. New, 1985 EHLR 211:372

In Aschenbrenner 1979 EHLR 211:110

the Department stated:

> Can P.L. 94-142 services be rendered to handicapped nonpublic school children on the premises of the nonpublic school?
>
> Comment: Since P.L. 94-142 is a federal program, it would appear that the services can be provided on the premises of the nonpublic school. Such an "on-premises" program would be parallel to the ESEA Title I program, which provides on-premises services for eligible non-public school children.

More recently, in Orschel, 16 EHLR 1368 (1990) the Department stated:

> The Department continues to hold the position stated by former Secretary Bennett regarding the Felton decision's effect on the constitutionality of on-premises services at private sectarian schools under IDEA.
>
> Former Secretary Bennett's letter does not address the issue of when Federal statutory and regulatory provisions would require a school district to provide on-premises

> services to students with disabilities voluntarily enrolled by their parents in a private school. The criteria for making that determination are set forth in Department regulations governing the provision of services by school districts to such students under various federally-funded education programs, including the IDEA. Whether a school district, in meeting these requirements, would have to provide on-premises services for children with disabilities enrolled by their parents in private schools depends on the particular circumstances which are present.

D. When does the federal act require the delivery of services on the premises of a private school?

There are five factors that determine when services must be provided on the premises of the private school (whether secular or not). They are:

1. The nature of the handicap and the service required to meet it. Anthony Wayne Local School District, 16 EHLR 1032 (1990) (school district

required to provide services for deaf children on premises of private, Lutheran school);[7] It is a stipulated fact that Matthew Goodall needs an interpreter full time in his regular classroom to be successfully mainstreamed. (App 8) Accordingly, cued speech interpretation is required to be given there.

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7. Accord, Case No. SE 85444 Los Altos School District, 1985-86 EHLL DEC 507:327 (1985) (a special education teacher for the visually handicapped was required to be furnished on the premises of a blind child's private school, because she could not benefit from her regular education program at the private school if her special education was provided at a public school site); In the Matter of the City of New York, 1984-85 EHLR DEC 506:309 (toileting assistance and handwriting assistance were required to be given on the premises of the non-public sectarian school attended by a wheelchair-bound child with cerebral palsy).

2. Cost. 34 CFR Section 76.655 requires the school board to spend the same average amount of program funds on a student enrolled in a private school who receives benefits under the program as it does on a student enrolled in a public school who receives benefits under the program. It is stipulated that the appropriate service for Matthew Goodall is one full time cued speech interpreter who would necessarily be one-on-one, because Stafford has no other deaf child in Matthew's grade using cued speech. (App 7) Therefore, it would cost no more to provide Matthew the interpreter at Fredericksburg Christian School than in one of Stafford County's public schools.

3. Least restrictive environment. The IDEA requires that a handicapped child be "educated in the school which he or she would attend if not handicapped". 34 CFR sec 300.552. Fredericksburg Christian School is the school Matthew would attend if he were not deaf. Therefore, special education must be provided to him there. Aschenbrenner, 1979 EHLR 211:110.

4. The rights of parents to direct the education and the religious upbringing of their children.

5. Free exercise. In Weithers, 1979 EHLR 211:108 (1979) the U.S. Department of Education stated:

> An LEA may not require a parochial school student to enroll in the public schools as a condition to receive benefits for services funded with federal dollars for the education of handicapped children...

In Matthew Goodall's case all five factors are present which would require the school board to furnish an interpreter on the premises of Fredericksburg Christian School.

E. How did the Fourth Circuit err in construing the federal statute?

1. First, the court never cited or distinguished Wheeler v. Barrera which construed virtually identical language in Title I of the Elementary and Secondary Education Act.

2. The court misinterprets the word "program". The "program assisted or carried out under this subchapter" is the entire extension of educational assistance to handicapped children in the state,

whether the children are in public schools or private schools. Moore, 16 EHLR 222 (1989); 34 CFR sec 76.1(a). The court wants to narrow the meaning of "program" to mean "a program at a public school site". There is utterly no authority in the act for this interpretation which completely changes the meaning of:

> provision is made for the participation of [private school] children in the program assisted or carried out under the subchapter by providing for such children special education and related services. 20 USC sec 1413 (a)(4)(A).

3. The court interprets "providing for such children special education and related services" in the same section to mean "offer them the opportunity to receive benefits at a public school site". Again, there is no authority for this interpretation in the act, and it

is directly contrary to the Supreme Court's holding in Wheeler v. Barrera under the virtually identical language of the remedial education act.

4. The Fourth Circuit said there is a "wealth of authority" that no benefits under the act would be provided on the premises of private schools. The Court cites McNair v. Cardimone, 676 F Supp 1361 (SD Ohio 1987). The rationale of the District Court in that case was rejected on appeal. McNair v. Oak Hill Local School District, 872 F 2d 153, 156 (6th Cir 1989). The District Court confused "education" with "special education", concluding that no child in any private school was entitled to benefits under the act, in complete disregard of the requirements of the act 20 USC sec 1413(a)(4)(A), its

regulations 34 CFR sec 300.403, 450-452 and the EDGAR regulations, 34 CFR sec 76.650-76.663 which govern the participation of private school children in federal education programs.

The court cited Work v. McKenzie, 661 F Supp 225, 229 (DDC 1987). The Fourth Circuit summarized the holding in Work v. McKenzie as follows:

> When public agency provides free appropriate public education, and parents choose to place child in private school nevertheless, public agency is not required to pay for the child's education at the private school". Goodall supra, 930 F 2d at 367.

This suggests a misunderstanding of the IDEA and the facts of this case. No one has asked Stafford County to pay for Matthew Goodall's education at Fredericksburg Christian School. Rather, Stafford County is asked only to

provide him special education and related services as the act and its regulations require. 34 CFR secs 300.403, 450-452.

The court cites Barnett v. Fairfax County School Board, 927 F 2d 146 (1991). Barnett made no free exercise claim; and after hearing on the merits a hearing officer concluded that there were economies for having all Fairfax County high school cued speech users in one school. The Goodalls have asserted from the beginning that there are no such economies in Matthew Goodall's case; and no hearing on the merits has been held to dispute that claim.

The Fourth Circuit cites the Department of Education's response to Robert Goodall's inquiry concerning a "bypass". The department's letter does

not support the Court's conclusion. The letter says essentially that a bypass is not the appropriate remedy for an individual violation of the IDEA by a local school board. The department's letter doesn't discuss the facts of the Goodalls' case in particular. Instead it states in general:

> Whether an LEA would have to provide on-site services to meet the 'equitable participation' requirement would depend on the specific facts respecting each of the students with handicaps enrolled in private schools within its jurisdiction to whom it is providing services. Goodall, 16 EHLR 1398 (1990)[8]

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8. That the Department of Education's position is that the IDEA sometimes requires services to be delivered on the premises of private sectarian schools is made plain in Orschel, 16 EHLR 1368 (1990).

As discussed at pages 45-49, the specific facts of Matthew Goodall's case require that the appropriate service for him, a cued speech interpreter, must be provided on the premises of his private school.

Finally the Fourth Circuit cites 34 CFR sec 76.532 which prohibits states or subgrantees from using grants to pay for religious worship, instruction or proselytization. This confuses "education" with "special education". If the Goodalls prevail, the school board will not pay for Matthew Goodall's education or instruction at FCS. It will pay for an interpreter who is not a teacher and does not affect the content of speech. To paraphrase the Court in Witters, any religious instruction Matthew gets is a result of the

genuinely independent and private choice of the aid recipients and not a result of state action; and that private choice is protected by the first amendment's free exercise clause and by the fundamental right of parents to direct the education and religious upbringing of their children.

CONCLUSION: The IDEA requires the Stafford school board to furnish Matthew Goodall a cued speech interpreter on the premises of Fredericksburg Christian School.

IV. Do Virginia statutes prohibit the use of federal IDEA funds to provide services to handicapped children in religious schools?

The Fourth Circuit committed the following errors:

1. It correctly held that the burden on the Goodalls' free exercise and parental rights requires a compelling state interest and strict scrutiny, but it completely failed to apply a "strict scrutiny" analysis to the Virginia statutes to see if they could be more narrowly drawn to advance a compelling state interest without offending the Goodalls' protected rights.

2. The court notes in footnote 1 of its opinion that Fredericksburg Christian School is not on the list of private schools approved by the Virginia Department of Education to provide special education and related services under the IDEA. This suggests a misunderstanding of the IDEA. Many public schools systems are not able to

provide services for some handicapped children. The IDEA therefore allows the public school system to place such children in private schools to meet the requirement of the act to provide services to them. 20 USC sec 1413(a)(4)B. Such private schools, which contract with public schools to provide such services, must be approved by the State Department of Education. Only the portion of a private school program providing special education to a publicly placed handicapped child must be state approved. Reedy, 16 EHLR 1364 (1989). Because the Goodalls are not asking the county school board to contract with the Christian school, because the Christian school does not provide the interpreter, and because

Matthew is placed there by his parents, Fredericksburg Christian School need not be state approved.

3. The court points out that children in custody of state boards or agencies can't be placed in sectarian schools. Matthew Goodall is not in the custody of a state board or agency. He is in the custody of his parents, and this Court recently reaffirmed the fundamental right of parents to direct the education of their children and the religious upbringing of their children in Employment Division v. Smith, 494 US _____ (1990).

4. The court cites article 8 section 10 of the Virginia Constitution which prohibits appropriations to

sectarian schools. The IDEA provides no assistance to any school. It provides assistance directly to children.

5. The court claims that Virginia's constitution and statutes express a policy of funding special education only in nonsectarian schools. However Virginia Code sec 22.1-219 states:

> Nothing in this article shall be construed to restrict or prohibit the use of any federal, state or local funds made available under any federal, state or local appropriation or grant.

6. The court never quotes or analyzes the three Virginia statutes which it claims support the county's position.

In fact, Code of Virginia sec 22.1-216 only prohibits the school board from contracting with Fredericksburg Christian School to

furnish Matthew Goodall an interpreter. No one has asked the school board to do so.

Code of Virginia sec 22.1-218 deals with the circumstance in which the public school is placing a handicapped child in a private school, because it is unable to provide the appropriate services in the public schools. It has nothing to do with the facts of Matthew Goodall's case in which the public school is able to provide to appropriate service, but the parents choose to place the child in a private school. See 34 CFR sec 300.403, 300.450-452.

Code of Virginia sec 22.1-220 deals only with county funds, not federal funds. IDEA funds are federal funds. 20 USC sec 1413(a)(9).

7. The court errs in concluding that the school board may require a private school to meet state standards if a parent has placed his child there. This one error has two parts:

a. The court cites no authority for this in the IDEA. The US Department of Education disagrees with the court:

> [IDEA] affects only those portions of the private schools' operation that affect publicly-placed students, and not the operation of the private school or facility as a whole. Reedy, 16 EHLR 1364 (1989).

b. The school board may not use "state standards", as a device to prohibit children from attending religious schools. Pierce v. Society of Sisters, 268 US 510 (1952); Wisconsin v. Yoder, 406 US 205 (1972).

8. IDEA is federal legislation. Its extension of educational assistance to all handicapped children has supremacy over any Virginia command that no federal benefit may be given to some of Congress' intended beneficiaries. U.S. Constitution, article 6.

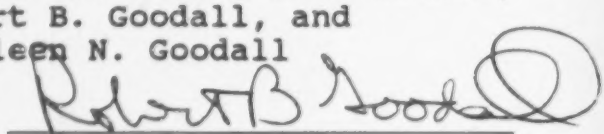
CONCLUSION:

Properly interpreted, Virginia statutes do not prohibit the use of federal IDEA funds to provide educational assistance for handicapped children attending private religious schools. If the proper interpretation of the statutes did prohibit such use, then the Virginia statutes must be struck down: there is simply no compelling state interest in prohibiting the education of handicapped children in religious schools or in prohibiting such

children from sharing in the benefit of a religiously neutral federal program to assist the education of handicapped children.

V. Issues on remand. Should the petitioners prevail, on remand the school board should be required to furnish Matthew Goodall a cued speech interpreter prospectively; Matthew's IEP should specify that the interpreter should be competent to cue anything the classroom teacher says, Ventura (CA) Unified School District, 16 EHLR 251 (1989); the Goodalls should be compensated for their expenses and the value of their time in interpreting for Matthew; and attorney's fees should be awarded the Goodalls. Burlington School Comm. v. Massachusetts Department of Education, 471 US 359, (1985).

MATTHEW B. GOODALL, an infant
by his father and next friend,
Robert B. Goodall, and
Kathleen N. Goodall

By: 
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